

The legal standards set forth in Quincy and Century Communications will also apply to any must-carry provisions of a cable bill that ultimately is passed. In short, the constitutionality of the must-carry provisions will turn on (1) whether there is a substantial governmental interest that supports the provisions and (2) whether the provisions are narrowly drawn so that their terms are essential to further that interest.

Presumably, the governmental interest offered in support of the must-carry provisions of H.R. 4850 will be the protection of the system of local broadcasting, coupled with related concerns for public access to diverse programs and competition among programmers.¹⁰ It remains unclear whether the Courts will determine that there is sufficient basis for these supposed interests to uphold any must-carry provisions in a cable bill. What is clear, however, is that the provisions of H.R. 4850 without the Ritter Amendment would not be upheld because they would not forward the supposed governmental interests that support must-carry and because they would be overly broad in providing unnecessary must-carry status favoring one communications company over non-broadcast competitors providing the same type of programming.

2. Provisions That Would Require Cable Systems To Carry Home-Shopping and Other Direct-Marketing Dominated Stations on the Basic Tier Would Not Advance the Supposed Goals of Must-Carry and Would Be Unconstitutional.

The "basic tier" of a cable system is made up of those services that a subscriber receives for the minimum cost of signing up for cable. The must-carry provisions proposed in H.R. 4850 would require cable systems in general to devote one-third of their channel capacity to carriage of local commercial television stations on the basic tier. Although certain aspects of these provisions may be constitutionally valid, others would violate the First Amendment.

among program suppliers. Therefore, mandated cable carriage of
home-shopping or direct-marketing dominated stations would do

HSN vis-a-vis other home-shopping companies such as QVC Network, Inc. that have confined their programming to cable.

In addition, others may try to convert stations into conduits for home-shopping and other direct-marketing formats such as one-half and full-hour "infomercials" in order to qualify for must-carry status under H.R. 4850. Again, encouraging such conversion of stations to home-shopping or direct-marketing domination would not serve the goals that must-carry is designed to fulfill and would have the result of favoring one competitor over another based only on its use of broadcast facilities.

The fact is that there is no reason why home-shopping company or other direct-marketing dominated stations should receive must-carry status of any kind:

-- Home-shopping and direct-marketing dominated stations by their very nature do not enhance the local system of broadcasting, because they are used almost exclusively for the remote broadcasting of nationally-transmitted sales presentations.

-- Home-shopping and direct-marketing dominated stations by practice do not enhance program diversity because they present an insignificant amount of local programming.

-- Favored treatment for home-shopping and direct-marketing dominated stations over competing cable programming services a fortiori would be anti-competitive.

As a result, a bill that included must-carry status for home-shopping or other direct-marketing programs merely because they were carried on broadcast stations would be the type of must-carry regulation that has been invalidated in the past as "'grossly' over-inclusive [because] the rules indiscriminately protect each and every broadcaster"¹¹ without regard to whether the supposed purposes of must-carry are furthered.

3. Rather Than Raising New Constitutional Issues, the Ritter Amendment Ameliorates Some of the Concerns Created by the General Must-Carry Provisions of H.R. 4850.

In proposing his amendment to H.R. 4850, Representative Ritter specifically recognized the significant First Amendment questions raised by legislation that would force some cable systems to carry home-shopping stations on their basic tier despite the primarily non-local and duplicative nature of the programming offered by those stations. Representative Ritter further noted that mandating cable carriage of home-shopping stations would confer an unfair advantage on one home-shopping company utilizing both broadcast and cable distribution systems over competing programmers and other special-interest cable networks, since many of these other networks would inevitably be forced off many cable systems due to inadequate channel capacity.

Representative Ritter proposed to avoid these unfortunate and legally suspect effects of H.R. 4850 with an amendment removing from must-carry status any commercial television station

"predominantly utilized for the transmission of sales presentations or program-length commercials." As the House Subcommittee recognized in adopting the Ritter Amendment on April 8, 1992, by making H.R. 4850 more congruent with its supposed goals of increasing localism and program diversity and competition, the amendment increases the likelihood that the legislation will pass constitutional muster. Thus, the amendment is a positive development from a First Amendment point of view.

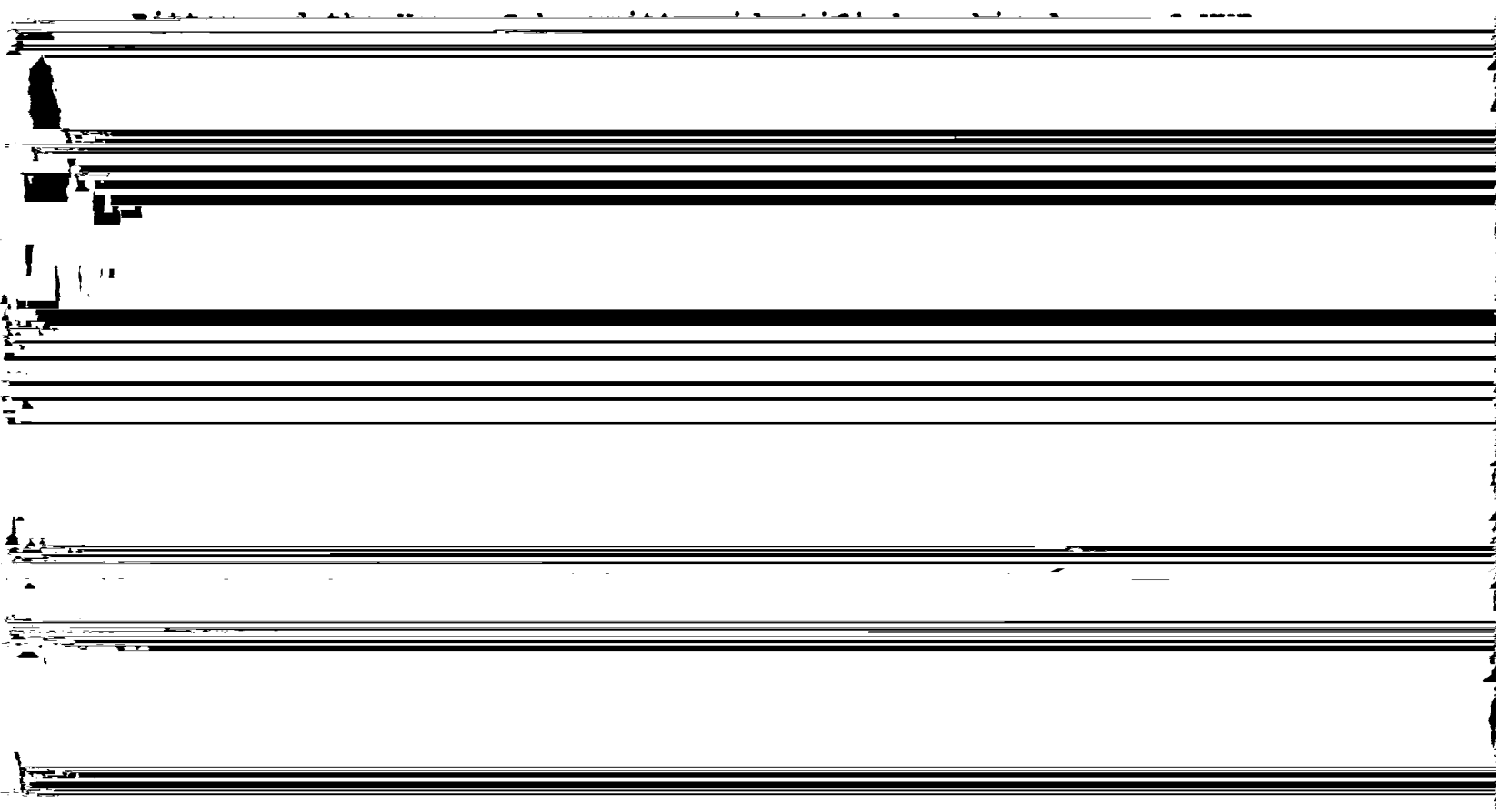
It comes as no surprise that the only home-shopping company that currently uses both UHF stations and cable feeds to distribute its programming is unhappy at the prospect of losing its preferential position under H.R. 4850 and therefore seeks to defeat the Ritter Amendment. In an attempt to preserve the unfair advantage that it would receive under H.R. 4850 as originally drafted, this company has launched a baseless attack on the amendment on First Amendment grounds and as a denial of equal protection.

The arguments advanced against the amendment turn the constitution on its head. As we have already shown, without the amendment H.R. 4850 itself would be highly unlikely to survive a challenge under the First Amendment, because it would extend must-carry protection to stations that do not promote the goals of must-carry and because it would grant one home-shopping company favored treatment over its competitors.

The defect in the attack on the Ritter Amendment is its failure to recognize that the burden on free speech at issue here

is created by the general must-carry provisions of H.R. 4850 and not by the amendment. H.R. 4850 requires cable operators to carry the signals of qualified local commercial television stations. In contrast, the amendment merely excepts certain types of stations from this requirement and permits cable operators to carry or not to carry the signals of those stations as they wish. Moreover, the exception of these stations from the general must-carry requirements is based on the fact that the programming offered by these stations does not forward the purported goals of must-carry. For all these reasons, the amendment furthers constitutional goals and clearly does not create any new constitutional concerns.

One home-shopping company has complained that the amendment is designed to discriminate against its stations alone based only on the content of their speech. While Representative



of its non-local broadcasts. Moreover, the amendment does not restrict or forbid carriage of such stations by cable operators; instead, it merely excludes those stations from the general must-carry provisions of H.R. 4850. For both these reasons the amendment is quite different from the statute involved in the News America case, which by design restricted the speech of a single company.¹²

The fact that the Ritter Amendment excepts certain stations from the general must-carry provisions of H.R. 4850 based on the nature of the programming of those stations does not create a constitutional problem, because it is the nature of those stations' programming that does not warrant their being given must-carry status in the first place. Under these circumstances, the Mosley case, which prohibits governmental distinctions between speakers based on the content of their speech,¹³ is inapposite. In any event, unlike the situation in Mosley, where by ordinance only labor picketing was permitted near a public school, under the amendment cable operators would "still [be] free to choose" to carry a home-shopping or direct-marketing dominated station over a competing home-shopping, direct-marketing, or other cable network.¹⁴ The amendment thus does no more than refuse to extend the automatic protection of must-carry beyond what is needed to achieve its stated goals.

The amendment proposed by Representative Ritter and adopted by the House Subcommittee is a modest, narrowly-drawn effort to remedy one of the First Amendment concerns clearly

presented by the general must-carry provisions of H.R 4850. As such, it should be endorsed by Congress and not itself subjected to baseless constitutional attacks.

FOOTNOTES

1. Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), clarified, 837 F.2d 517 (D.C. Cir.), cert. denied, 486 U.S. 1032 (1988); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986).
2. Quincy, supra, 768 F.2d at 1450-51, quoting United States v. O'Brien, 391 U.S. 367, 377 (1968).
3. Quincy, supra, 768 F.2d at 1454 and 1457, quoting Home Box Office, Inc. v. FCC, 567 F.2d 9, 50 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).
4. Quincy, supra, 768 F.2d at 1459.
5. Id. at 1459-62.
6. Id. at 1460.
7. Id. at 1461.
8. Id. at 1462.
9. Century, supra, 835 F.2d at 300-04.
10. See H.R. Rep. No. 682, 101st Cong., 2d Sess. 62 (1990).
11. Quincy, supra, 768 F.2d at 1460.
12. See News America Publishing, Inc. v. FCC, 844 F.2d 800, 814-15 (D.C. Cir. 1988).

13. See Police Department v. Mosley, 408 U.S. 92, 96 (1972).
14. See National Association of Independent Television Producers & Distributors v. FCC, 516 F.2d 526, 537 (2d Cir. 1975).